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CONFLICT BETWEEN STATE AND FEDERAL LAWS CONCERNING RAILROAD RATE REGULATION.

The recent rate laws have been productive of much trouble between the state and United States authorities. Open conflict was averted in Missouri only by concessions on the part of the railway representatives. It seems also to have been the course pursued in North Carolina. But sooner or later this question will take on a new and more serious shape. We were of the opinion sometime before these troubles took on so serious an aspect that the railroads were making a mistake in fighting the Federal Employer's Liability Act, for it was growing more and more apparent that the time was at hand when railroads must be controlled by federal authority. To have each state making laws to govern the great lines of railroad leaves the door open for trouble and even to open rebellion.

In any event it behooves all of our citizens to be tranquil and work out the judicial means by which there shall be no delay in reaching the United States Supreme Court with these important questions. The people will bow to an opinion of the United States Supreme Court, where they will be restive if a lower federal court passes on the opinion of the supreme court of a state adversely. In the very nature of things it seems incongruous that, as to questions of great national importance, where a state supreme court has passed on the constitutionality thereof that interference therewith should be offered by any other than the Supreme Court of the United States. If an emergency should arise requiring prompt action through the means of a process sued out of an inferior United States court in order to prevent an injustice, provision should be made therefor, and the matter at once removed to the Supreme Court of the United States for hearing and be immediately passed upon. Questions which tend to greatly disturb public tranquility, as a matter of public policy, should be disposed of without delay where a federal question is involved, and though there be no precedent, it would seem as though the court could make one to meet the emergency. We have been forgetting that the people created courts for the purpose of maintaining the public tranquility and it would also seem as though it must necessarily follow that the courts had power to conform such action to the nature of the subject matter, and furnish the necessary procedure. The preamble to the constitution reads: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity do ordain and establish, etc.," not a single provision of which does not sustain our position, that the courts themselves have inherent power to so proceed as to promote any of the above provisions. Due process of law is government; the objects of government are set forth in the preamble and the courts are established to carry these objects into effect.

Lex non exacte definit sed arbitrio boni viri permittit (the law does not exactly define but trusts in the judgment of a good [wise] man), is a maxim which lies at the base of government. A good and wise judge may so use it as to bring the blessings of a grateful land upon his head and this shows forth, with tremendous emphasis, in the importance of the appointment of men to judicial positions, of the highest integrity and wisdom. It is, as we have said, the greatest responsibility with which the office of the president is empowered by the constitution and upon its wise use depends the tranquility of the nation more than in any power with which that exalted office is imbued. This power should never be exercised with the object in view of obtaining partisan judges, for nothing would tend to disturb the public tranquility more than an attempt to mix partisan views with judicial wisdom. History records the fearful consequences to government when such things have been done. When Rome "sat on her seven hills and from her throne of beauty ruled the world," it was her laws and their superb administration, more than her armies, which inspired awe and reverence for her government. When her judges and her laws were corrupted the discontent

arose which marked her decline and fall. What are a nation's armies to the discontent of its citizens? Are not her armies made up of her citizens? When the time arrived that a Roman citizen who called for justice, "was answered by the lash," her ruin was complete.

The great railroad systems of the country are her veins and arteries; they should be controlled by the federal power; therefore, should answer to that authority alone where questions of due process of law are concerned. Domestic tranquility has already been shaken because of the fact that both the state and federal powers are endeavoring to control certain of the functions of these great veins and arteries; it is obvious that with four or five or more states, each enacting laws to regulate the functions of those veins and arteries that there is bound to be trouble which the nation will feel, its length and breadth. It would seem then that the part of wisdom dictates that the functions of one jurisdiction should alone be invoked, to insure domestic tranquility. That court must necessarily be the United States courts which cover the land.

A case which illustrates how important it is that one jurisdiction should take cognizance of all our commercial transactions, is that of the Louisville & Nashville R. R. Co. v. Eubank, 184 U. S. 27. The following statute was there passed upon: "It shall be unlawful for any person or corporation, owning or operating a railroad in this state, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included in the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this state, to receive as great compensation for a shorter as for a longer distance: Provided, that upon application to the railroad commission, such common carrier, or person, or corporation owning or operating a railroad in this state, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this state, may be relieved from the operations of this section." This provision was held by the Supreme Court of Kentucky to be valid upon the matters arising out of it, but was reversed upon an appeal in the case referred to above. The United States Supreme Court said among other things: "The result of the construction of this provision by the court below is in effect to prohibit the carrier from making a less charge for the transportation from Nashville to Louisville than from Franklin to Louisville, or else to make a charge that will prevent its doing any business between the states in the carrying of tobacco. The necessary result of the provision under the circumstances set up in the answer directly affects interstate rates, or in other words, directly affects interstate commercee for it directly affects commerce between Nashville and Louisville. The fact is not altered by putting the proposition in another form, and saying that the constitutional provision only prevents the carrier from charging a greater sum for the shorter distance from Franklin to Louisville, both within the state, unless the consent of the railroad commission is obtained, because in either event the charge from Nashville to Louisville enters into and forms part of the real subject matter of the provision, the greater sum for the shorter distance within the state being compared with the lesser sum for the longer distance without the state; and the prohibition is absolute unless the consent of the commission is obtained, from charging any more for the shorter distance within the state than for the longer distance partly within and partly without the state. And in this case, in order to maintain its state rate, it must fix its interstate rate at an amount which prohibits its doing interstate business. We fully recognize the rule that the effect of a state constitutional provision or of any state legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the

state to a point within it, or from a point within to a point without the state, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provison is direct and important and not a mere incident."

This case merely shows the manner in which the construction of the United States Supreme Court of interstate commerce laws comes in conflict with such construction by a state court. The recent events in Missouri and North Carolina show how more than important it is to avoid conflicts. These events show not only the importance of federal control of all railroads, but also show the great importance of uniform laws in all the states. We must have the greatest consideration on the part of the president in the appointment of the members of the interstate commerce commission, for the responsibility placed upon them has become greater than that of any body of men in the country.

The insatiable greed of many of the railroad magnates has brought on the present troubles. The people are to a great extent also responsible, for they bow down to the man of wealth and call him successful who has managed to skin his fellow man and make a hog of himself. The hog is a deified member of a church, showing that its members are really worshiping the hog, while pretending to worship God. The net result is a lot of little hogs attempting to hog their fellow men in hopes that they may grow into large hogs and thus attain happiness. The country is suffering from a superabundance of these hogs. The possibilities of railroads as lines to wealth have attracted the largest hogs and they have grown fat and their greed has grown by what it has fed on. The moral effect on the country has been bad. But the railroads are not the only institutions which need a commission to regulate their affairs. With an interstate commerce commission which will compel justice, the rights of all citizens will be preserved. There will be no need of state laws to regulate commerce. In the long run the voice of the people will be heard.

But we must also not forget that upon the management of our great rail road systems depends the prosperity of the nation. We must look the bald facts in the face though our ideals be shattered. Our railroads are national affairs, not state affairs, and we must all calmly submit to the inevitable. We must let the nation control them by a systematic policy which the congress chosen by all the people shall dictate and direct. The effort to do this by all the states must result in confusion and general disorder. The tranquility and general welfare of the people can only be preserved by leaving to the national government the management of national affairs. Who is so blind as not to see that the railroads of the country must be managed as national affairs and should have uniform laws to control them?

NOTES OF IMPORTANT DECISIONS.

CRIMINAL TRIAL — BIAS OF PROSECUTING WITNESS.—While the bias of the prosecuting witness in a criminal trial may always be shown in behalf of the defendant to affect the credibility of his testimony, nevertheless we do not believe this right of the defendant is abridged sufficiently to constitute error, by an instruction to the jury that the cause for the bias of the prosecuting witness "had nothing to do with the guilt of the defendant." Yet this is the result arrived at by the Supreme Court of Alabama in the recent case of Wright v. City of Anniston, 44 So. Rep. 151, where the court held that in a criminal prosecution, where there was evidence of an assault by a witness for the prosecution upon defendant, it was error for the court to instruct that such an assault, if made, had nothing to do with the defendant's guilt or innocence, since it had the effect of depriving the defendant of the right to have the jury pass upon the bias of the witness. Three judges dissented (Dowdell, Simpson and Denson, JJ.) on the ground that the above charge was merely misleading, and that its misleading tendency could have been obviated by an explanatory charge on request of defendant.

Our criminal practice is clogged and hindered too much by useless technicality, much to the disgust of the people who see guilty parties set free or given new trials for reasons which do not appeal at all to any sense of justice or fairness. While every reasonable safeguard is to be thrown round a man charged with crime in order that no innocent man might suffer, nevertheless, such safeguards must not be made so rigid and unreasonable that no guilty man can be punished. It might be considered a reasonable rule that where a charge given for the state is merely misleading from certain view points and not erroneous in itself, and where the defendant is offered ample opportunity to correct its misleading tendency by an instruction of his own and refuses to offer such explanatory instruction, he should not be per-

mitted to urge the giving of such instruction as a reason why a verdict in the trial upon all the evidence and in which there is no other alleged error, should be set aside and the state again be called on to gather its forces together for another trial. The charge given by the court was not error; it was merely misleading. In giving the instruction the court had only one idea in view, and that a correct one, but neglected, as many courts and lawyers often do to notice a tendency in the words used to convey the idea intended, to insinuate still another meaning not intended. In this case it is quite true as the court instructed the jury that a quarrel between the prosecuting witness and the defendant not involved in the facts necessary to sustain the state's case on trial had nothing to do with the guilt or innocence of the defendant. The fact that A assaulted John Jones on Monday does not affect the guilt or innocence of John Jones on a charge of grand larceny in which A may be the prosecuting witness in a proceeding tried on Tuesday. The testimony of such an assault is only admissible as showing a bias or prejudice on the part of A and to that extent affect his credibility. If the defendant desires a charge explaining the instruction as to the effect of such evidence, he should ask for it and not be permitted to make his failure to ask for a proper explanatory instruction a ground for the reversal of a verdict against him.

PUBLICUM BONUM PRIVATE EST PREFERENDUM.*

II.

The theory of our government is that the federal government has reserved to the states certain rights and powers, and that the state has reserved to the citizen certain rights, which are guaranteed by the constitutional provisions, both federal and state, protecting persons against being deprived of life, liberty, or property without due process of law, and with which the state cannot interfere; that these rights consist of the right of every citizen to be free in the enjoyment of all his faculties, the right to the free use of them in lawful ways, the right to live and work where he will, the right to earn his livelihood by any lawful calling, the right to pursue any livelihood or avocation, and the right of entering into contracts that may be necessary and essential to the enjoyment of these rights, and that while, according to the doctrines of the commune that the state may control the desires, passions, habits, appetites, and tastes of the people as manifested in their acts, dress, food, and mode of living, our government, based on the individuality, intelligence, and particularly moral intelligence, of the citizen, does not claim to control him except in so far as his conduct affects others, otherwise he is to be sole judge of all matters that may affect him. In the early legal interpretation of this doctrine under the provision against deprivation of life, liberty, or property without due process of law as embodied in the fifth amendment to the constitution of the United States and which was only obligatory upon congress, the spirit of the doctrine was strictly adhered to in its application to concrete cases, but upon the adoption in 1868 of the fourteenth amendment, sec. 1, that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws," the powers of the federal courts and congress were largely expanded and this theory was greatly modified and changed in its legal interpretation. There is no question but that this amendment smacks somewhat of paternalism, and therefore may be reckoned as the first step in that direction. With the adoption of this amendment the federal courts were delegated with the authority and power to declare state laws and judicial decisions invalid whenever they abridged the fundamental rights of citizens or denied them the privilege of due process of law. The first case in which this amendment came to the attention of the United States Supreme Court was the so-called slaughter house cases,[1] wherein was questioned the constitutionality of a statute passed in 1869 in Louisiana granting to a particular slaughter house company the sole and exclusive right of carrying on a live stock landing and slaughter house business within certain limits defined in the law, and requiring all animals intended for sale and slaughter to be landed at their wharves or landing places. The court recog-

* The discussion of this subject was commenced in our issue of August 2, 65 Cent. L. J. 79.

[1] 16 Wall. 36.

nized the amendment as not being solely restricted to secure full enjoyment of freedom to the colored people, but in conjunction with this they gave full recognition to the police power which it was said had remained with the states in the formation of the original constitution of the United States and had not been taken away by the amendments adopted since that time. After the following quotation from Chancellor Kent on the police power: "Unwholesome trades, slaughter houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all be restricted by law in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbor's, and that private interests must be made subservient to the general interest of the community,"[2] the court, in this particular case, declared the statute to be within the police power. The court recognizing the principle that the individual interests are subservient to the public interests naturally gives rise to the sentiment of governmental paternalism, in spite of the doctrine of certain fundamentally guaranteed rights. In turning to the state constitutions, it will be found that in some of them this sentiment is expressed. For example, as stated in my previous paper, the constitution of Massachusetts, adopted in 1780, sets forth "as a fundamental principle of the social compact that the whole people covenant with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for 'the common good,' and that government is instituted 'for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, power, or private interests of any one man, family, or class of men,'" while the Bill of Rights of the convention of Virginia, which assembled at Williamsburgh on the 20th of March, 1775, contained the following: "All men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety." And which principle was subsequently embraced in the Declaration of Independence of July 4th, 1776, and is now the preamble of the Civil Rights Bill of the constitution of the state.

In comparing the two expressions of the popular will as manifested in their constitutions as the fundamental law of these states, widely different sentiments manifest themselves and the dominant opinions under the one would not be like the dominant opinions under the other, provided they were under no other dominating influence or idea than that expressed in their constitutions. But the national idea has found such forcible expression in the national consciousness that pride of country has dominated pride of locality and the dominant opinion on certain subjects, especially economic ones, irrespective of fundamental principles, has a tendency to become uniform throughout the country, and with this to become a law. The inference to be drawn from this is not that the dominant opinions in the states have not remained true to fundamental principles, but that the tendency has been to follow the general trend of popular opinion.

Economic forces tending to greater consolidation and concentration naturally stimulate these conceptions in the popular mind until they find expression in a dominant opinion which in time finds legislative expression, either in federal or state legislation, owing to the dual nature of our government. The court when dealing with this legislative expression in the form of federal or state statutes by declaring them valid or invalid sanctions or nullifies this dominant opinion as the case may be. The sanctioning or nullifying this dominant opinion under a federal or state statute will affect the nation at large or a specific portion. In the legal interpretation of this legislative expression the court must take cognizance of the dual nature of our government in that it must maintain a certain equilibrium between the federal and state government as well as between the individual rights and the rights of the collective. Since the recognition of the police power in the slaughter house cases under the fourteenth amendment the courts have met with some difficulty in maintaining this equilibrium. As Mr. Justice Holmes, in his dissenting opinion, in

[2] 2 Kent, Comm. 340.

Lochner v. New York,[3] has truly said: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premises." Every concrete case in which a statute directly or indirectly involves a fundamental right, when upheld, will abridge that right, and the concrete cases necessary to destroy the right may seem unlimited, yet each case narrows the sphere in which the right may be exercised. The United States Supreme Court in interpreting the power to which in its exercise the curtailment of these fundamental rights is largely due, speaks of it, in a recent decision,[4] as "vaguely termed 'police power' the exact description and limitations of which has not been attempted by the courts." Although this court has passed upon it for almost half a century in a long line of decisions, courts have been striving hard to give expression to a general principle of law whereby an equality could be maintained between purely private and public rights. This is manifest in many expressions of the court, for example "enjoyment upon terms of equality with all others in similar circumstances, the tendency to equality between employer and employee," etc., but still the limits of the members of the equation will not yield to a general equality. The equality must be sought between the limitations or restraints to be placed upon the principle that the liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, and the limitations and restraints to be placed upon the principle that private interests are subservient to the general interests of the community. In spite of legal maxims and principles there is a force at work in the social organization which exerts its influence upon the expression of the law in meeting the new conditions as they arise.

An examination of the various definitions of the police power from early times onward will give an idea as to its expansiveness and lack of definiteness as to its limitations. Blackstone defines this power as "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like the members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious and inoffensive in their respective stations."[5] Chief Justice Shaw in Commonwealth v. Alger,[6] said: "It is much easier to perceive and realize the existence and source of this power, than to mark its boundaries, or prescribe limits to its exercise." In Rochester v. West,[7] the court said: "A power which inheres in the state and in each political division thereof to protect by such restraints and regulations as are reasonable and proper the lives, health, comfort and property of its citizens." A more specific statement of the functions of the police power is given in Commissioners of Canals v. Lock Co.,[8] where the court said: "Police is, in general, a system of precaution, either for the prevention of crime or of calamities. Its business may be distributed into eight distinct branches: (1) Police for the prevention of offenses; (2) police for the prevention of calamities; (3) police for the prevention of epidemic diseases; (4) police of charity; (5) police of interior communications; (6) police of public amusements; (7) police for recent intelligence; (8) police for registration." Under the title constitutional law, in Cyc. appears the following definition: "Police power is the name given to that inherent sovereignty which it is the right and duty of the government or its agents to exercise whenever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure in any respect such economic conditions as an advancing civilization of a highly complex character requires." Thus the power covers almost every conceivable subject of legislation. It is to be exercised whenever public policy in a broad sense demands it and the regulations are to be reasonable and proper. These are the two essential elements to the proper exercise of the power. Although the supreme court and court of appeals of the state of New York, in Lochner v. New York,[9] upheld the dominant opinion as expressed in the legislative will as a reasonable and proper health regulation, yet the Supreme Court of the

[3] 197 U. S. 25.
[4] Lochner v. New York, *supra*.
[5] 4 Bl. Com. 162.
[6] 7 Cush. (Mass.) 53.
[7] 29 N. Y. App. Div. 125, 51 N. Y. Supp. 482.
[8] 6 Oreg. 222.
[9] *Supra*.

United States held that the statute cannot be sustained as a valid exercise of the police power to protect the public health, safety, morals and general welfare. The court said: "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are in reality passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed, and whether it is or is not repugnant to the constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purposes."[10] As judged by the dissenting opinions in Lochner v. New York,[11] there was no good reason why the statute should not have been sustained and the principle enunciated in regard to the limitation placed upon the right of contract is not consistent with previous decisions on the same question. In cases of this kind the court's beliefs and opinions on the facts as related to public policy and the reasonableness of the regulation enter very materially in its deliberations.

The difficulty that presents itself in these cases is the tendency to meet general propositions with general rules. For example, that the constitution of the United States is the paramount authority, and that the state, exercising its police power by providing by legislation for the protection of the public morals, the public health, the public safety, or the public welfare, must not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government.[12] Or, again, that like of man, the state has the first right of self-protection, and with this right the universally acknowledged power and duty rests upon the state to enact and enforce such laws as may rightly be deemed necessary or expedient for the morals, health, safety, comfort and welfare of its people, provided they do not clearly, palpably, and plainly violate the constitutional provisions.[13] Both of these statements practically embody the same principle, but the latter voices a sentiment more strongly in favor of paternalism.

The fourteenth amendment has been mainly involved in this class of cases and the tendency of the law in this respect is well stated in the following quotation from Mr. Justice Holmes' dissenting opinion in Lochner v. New York, *supra:* "I think that the word 'liberty,' in the fourteenth amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."

Toledo, O. FRANKLIN A. BEECHER.

[10] Minnesota v. Barber, 136 U. S. 313, 34 L. Ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. Ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213.

[11] *Supra.*

[12] Henderson v. Mayor of New York, 92 U. S. 259; Railroad Co. v. Husen, 95 U. S. 465; Gas Light Co. v. Light Co., 115 U. S. 650, 6 Sup. Ct. Rep. 252; Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. Rep. 454; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064; Steamship Co. v. Board of Health, 118 U. S. 455, 6 Sup. Ct. Rep. 1114; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273.

[13] Slaughterhouse Cases, 16 Wall. 36, 21 L. Ed. 394; Butchers' Union, S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co., 111 U. S. 746, 28 L. Ed. 585, 4 Sup. Ct. Rep. 652; Bowman v. Chicago & N. W. Co., 125 U. S. 465, 31 L. Ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689; Lawsen v. State, 152 U. S. 136, 38 L. Ed. 388, 14 Sup. Ct. Rep. 499; Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 172, 34 L. R. A. 725, 36 S. W. Rep. 1041; New York v. Miln, 11 Pet. 139, 9 L. Ed. 662; Smith v. Trevor, 7 How. 457, 12 L. Ed. 813; Smith v. State, 110 Tenn. 494, 41 L. R. A. 432, 46 S. W. Rep. 566; Austin v. State, 101 Tenn. 567, 50 L. R. A. 478, 48 S. W. Rep. 305.

EXEMPTION OF WITNESSES FROM SERVICE OF PROCESS.

SKINNER & MOUNCE COMPANY v. WAITE.

Circuit Court United States, District of Idaho, Northern Division, July 12, 1907.

A person going into another state as a witness or as a party to attend upon a trial of a cause is exempt from process in such state while he is necessarily attending there in respect to such trial.

Where persons entitled to exemption from service as parties or witnesses to some legal proceeding, lay aside their character of parties or witnesses and engage in transactions giving rise to the institution of actions against them by third parties, they are deemed

to have waived the privilege which they might otherwise claim.

There is a material distinction between the right of exemption of one who of choice goes into a jurisdiction for the purpose of enforcing a claim, and the right of one who is compelled to come into a foreign jurisdiction to protect himself against a claim which is being made upon him in a suit to which he is defendant.

DIETRICH, D. J.: The defendant (Waite) never resided in the state of Idaho, but at all times referred to in the record was a resident of the city of Portland, in the state of Oregon. He owned real estate in Nez Perce county, Idaho, the title to which he conveyed to the defendant Burns as security for a loan. This suit was commenced in the state district court of Nez Perce county to recover from the defendants $2,500 alleged to be due to the plaintiff on account of commission for the sale of this real estate. No service was made on Burns. Waite, having been served with process in Nez Perce county, appeared specially for the purpose of removing the cause to this court and also for the purpose of quashing the service of summons.

It seems that the plaintiff is an Idaho corporation, engaged in the real estate brokerage business at Lewiston, Idaho, and it claims that the defendants listed with it for sale the real estate referred to, and that it procured a purchaser, but after it had procured such purchaser, the defendants declined to convey the property to him and transferred the same to other parties. Thereupon the purchaser brought suit in the state district court against Walter J. Burns and his wife, Mary C. Burns, and the parties to whom the property was conveyed, to enforce specific performance of a contract alleged to have been made with the purchaser to convey the property to him. Waite was not made a party to the suit, but by notice the defendants demanded that he appear and defend their title to the property. Responding to this notice Waite came to Lewiston to participate inthe trial, and after coming into the state he was served with a subpœna requiring him to attend and testify as a witness upon behalf of the defendants. During the course of the trial and after the subpœna had been served, summons in this action was served upon him while he was in the court room.

The contention presented by his motion to quash the service of summons is that Waite was exempt from service by reason of the fact that he came into the state virtually as a defendant and for the purpose of making a defense in a suit to which he was a party in interest; and further, because he was being held in the state by the subpœna requiring him to be present as a witness. No question is made by the defendant that the cause has been properly removed to this court or that the objection to this service of summons was made seasonably and in a proper manner; nor is it claimed that the defendant came into Idaho for any other purpose than to participate in the trial of the action in the state court; or that he transacted any other business in the state; or that he remained in the state longer than was required after the subpœna was served upon him. As I understand the position of counsel for the plaintiff, it is tacitly, if not expressly, conceded that however diverse the decisions of the state courts may be, the rule in the federal courts, almost without exception, is that a person going into another state as a witness or as a party to attend upon a trial of a cause is exempt from process in such state while he is necessarily attending there in respect to such trial. The only case from a federal jurisdiction cited upon behalf of the plaintiff and supposed to support the validity of the service under consideration is Iron Dyke Copper Min. Co. v. Iron Dyke R. Co., 132 Fed. Rep. 208. The contention of the defendants in that case was that "their presence was necessary as plaintiffs and witnesses," and that, therefore, they were exempt from service. The plaintiff "contended against the motion that this exemption only exists in favor of witnesses and that it does not exist in any case in favor of the plaintiff."

It will thus be seen that it was conceded by both parties that the exemption exists in favor of witnesses for the defendant and the contention was over the application of the rule to the case of a plaintiff. But the court declined to consider the question in dispute for the reason, as the court stated, that "it appears that these defendants organized a corporation and made surveys for the purpose of acquiring valuable franchises, in violation, as alleged, of the right of the Iron Dyke Copper Mining Co., and that they were so engaged at the time of the service upon them. In such a case the defendants are not entitled to plead the exemption claimed for them." And this is in accordance with a general exception that where persons entitled to the exemption, lay aside their character of parties or witnesses and engage in transactions giving rise to the institution of actions against them by third parties, they are deemed to have waived the privilege which they might otherwise claim.

It is apparently attempted to bring this case within the general exception thus stated by suggesting that this action grew out of the issues involved in the case which the defendant Waite was attending at the time of the service of summons and by further suggesting that the defendant was in the state of Idaho as a witness in furtherance of the wrong for which the plaintiff sues in this action. But I am not able to fully appreciate the bearing or force of these suggestions. Upon the showing made by the record, I cannot see how the success or failure of the plaintiff in that case could affect the cause of action set forth in the complaint in this suit. If, as alleged in the complaint, the defendants Waite and Burns entered into an agreement with the plaintiff by which the plaintiff was to receive 5 per cent. of the selling price, if they could find for the defendants a purchaser for the land referred to; and, if as alleged, the plaintiff, pursuant to this agreement, found a

purchaser who was able and willing to purchase the land for the price for which the plaintiff was authorized by the defendants to sell it, it would hardly be conceded by the plaintiff that it could not recover from the defendants its commission, after the same was fully earned, because the defendants, in violation of their understanding with the plaintiff, declined to made the sale. If the allegations in the complaint are true, the plaintiff's right of action fully accrued when it found a purchaser who was able and willing to purchase the property at the price for which the defendants had authorized the sale, and its right to recover could not be made to depend on the adjudication of the issues in the suit brought by the purchaser for specific performance.

In the following federal cases the general rule of exemption is stated in various forms and is applicable to these circumstances: Parker v. Hotchkiss, 1 Wall. Jr. 259, No. 10739 Fed. Cases; Lyell v. Goodwin, 4 McLean, 29; Brooks v. Farwell, 4 Fed. Rep. 166; Plimpton v. Winslow, 9 Fed. Rep. 365; Atchinson v. Morris, 11 Fed. Rep. 582; Nichols v. Horton, 14 Fed. Rep. 327; Small v. Montgomery, 23 Fed. Rep. 707; Kauffman v. Kennedy, 25 Fed. Rep. 785; *Ex parte* Schulenberg, 25 Fed. Rep. 211; Holyoke Co. v. Ambden, 55 Fed. Rep. 593; Kinne v. Lant, 68 Fed. Rep. 436; Hale v. Wharton, 73 Fed. Rep. 739; Morrow v. Dudley, 144 Fed. Rep. 441. Five cases from state courts are cited in support of plaintiff's position, one from Illinois, two from Indiana, one from California, and one from Idaho. No useful purpose would be subserved by an attempt on my part to collocate or classify or distinguish the decisions upon this subject from the state courts. It must be conceded that they are hopelessly in conflict; and I think it must be further conceded that the weight of authority is in harmony with the rule followed by the federal courts. It is proper, however, that I should refer to the case decided by the Supreme Court of Idaho and relied upon by the plaintiff, namely, Guynn v. McDaneld, 43 Pac. Rep. 74. There the court held that McDaneld was a nonresident of the state while attending the United States Circuit Court in Idaho as plaintiff in a suit brought by him against Guynn, a resident of Idaho, and was not exempt from service of a summons in an action commenced by Guynn aginst him in the state district court. The court, through Mr. Justice Huston, says: "The only question before us is, is a nonresident plaintiff exempt from service of summons in a civil suit while in attendance upon court within this state as plaintiff? This question has frequently been before the courts of this country, both state and federal; and while there has been a pretty general uniformity in the decisions of the federal courts, those in state courts have been almost distractingly variant." While in general language dissent from what is conceded to be the doctrine of a majority of the cases is expressed, still it would seem from the reasoning and illustrations used in the course of the opinion, that it was intended to confine the decision to the facts of the case and to hold merely that the rule would not be recognized as exempting a nonresident plaintiff who is "in attendance upon a court within this state as a plaintiff." This appears from the language above quoted, and it further appears from other parts of the decision. For instance: "The nonresident has sued his debtor in a forum selected by himself wherein to enforce his claimed rights, but he will not submit to have the claim of his debtor adjudicated in the same forum." Under some circumstances at least there would appear to be a material distinction between the right of exemption of one who of choice goes into a jurisdiction for the purpose of enforcing a claim, and the right of one who is compelled to come into a foreign jurisdiction to protect himself against a claim which is being made upon him in a suit to which he is defendant. Judge Huston also quotes from and makes a vague reference to sections 4123 and 4143 of the revised statutes of Idaho, but it is not at all clear that they were intended to be made the basis of the decision. While it may be that the court was influenced somewhat by these statutory provisions, the conclusion reached is neither by express language nor by fair implication made to depend thereon; and if the view was entertained that whatever the general rule of law might be, these sections authorized the service of process under the circumstances disclosed by the record, it is difficult to perceive the pertinency of the discussion indulged in by the court, or to understand why it should have stated that while the majority of the decisions were to the contrary, it was comforted by the reflection that in the position which it had taken it had the support and concurrence of many of the most highly esteemed courts of the country. If, in the judgment of the court, the service in question was authorized by the statutes of the state, there was reason neither to express dissent from the rule conceded as prevailing in the federal courts, and in a majority of the state courts where there are no pertinent statutory provisions, nor to seek comfort in the concurrence of courts which refuse to recognize the rule, even where there has been no legislation.

Upon behalf of the defendant it is suggested that whatever view may be taken of the scope of the decision, it could, at most, be regarded as only persuasive, and that it is my duty to follow the general rule as recognized in the federal courts; and in support of the proposition my attention is called to the elaborate and very able discussion of the precise question, in the case of Hale v. Wharton, 73 Fed. Rep. 739, opinion by Judge Phillips. No material distinction can be drawn between the circumstances of that case and this, even if it be assumed that in the Guynn-McDaneld case the Idaho Supreme Court based its decision upon a construction of the statutes referred to, and it is there held that where an action is brought in a state court and personal service is made upon the defendant, while he is

within the territorial jurisdiction of the court, in the mode described by the statutes, as construed by the highest court of that state, the defendant can, after removing the cause to the federal court, successfully move to quash and vacate service of summons, by invoking the general rule under consideration. While not questioning that the rule is well founded in reason, and embodies a wise judicial policy, I am not convinced, as seems to be held in this case, that the immunity thus furnished to parties and witnesses is such a constitutional or natural right that it can be neither taken away nor impaired by legislative enactment or judicial construction, and that the rule belongs so exclusively to the domain of general jurisprudence that the federal courts may exercise their independent judgment, in disregard of the action of state legislatures and state courts. But whether the exemption is a mere matter of judicial expediency or whether it inheres in the fundamental principles of justice, it is, in my view of the case, unnecessary for me to determine at this time. Assuming, but not deciding, that it is not a principle, but a mere policy, and that it may be set aside by legislative enactment, and that the federal courts are bound by state legislation and the construction placed thereon by the state courts, what should be my conclusion in the premises? If there is no controlling statute, the prevailing rule in the federal courts, with which I am in accord, requires that I grant the motion. Turning to the Idaho statutes and exercising my independent judgment, after a most earnest consideration, I must confess that I am utterly unable to see how either section referred to has any application to or bearing upon the question under consideration. Section 4123 is found in a chapter concerned exclusively with the place of trial of civil actions. There is no attempt to prescribe the mode of service, or to designate the place of service, or to enumerate the persons or classes of persons, upon whom service may be made; or to prescribe or limit the conditions of service. Section 4143, especially the first sentence thereof, to which reference is made in the Guynn-McDaneld case, only provides by whom the service may be made. There seems to be no purpose to prescribe the conditions or circumstances under which a valid service may be made; or to designate the person upon whom summons may be served. It is simply provided that within his county a sheriff may serve process; and that other persons, with certain qualifications, may make such service anywhere. Being able to construe these statutes as evincing an intention on the part of the legislature to modify or abrogate the general rule of exemption, it is my plain duty, in the absence of an unequivocal construction to that effect by the supreme court of the state, to give force and effect to the general rule recognized in federal jurisdiction. The motion will therefore be allowed.

NOTE.—*Waiver of Exemption from Service of Process by Reason of Attendance Upon Court by Non-resident Party or Witness.*—Following our usual custom we have narrowed the questions discussed in the principal case to that stated as the subject of this annotation. It is useless to cite authority for the general rule that parties and witnesses in attendance upon judicial proceedings in a foreign state are privileged from service of summons in a civil action issuing from a state court in such state, and that this privilege extends to a reasonable time after the disposition of the cause to enable such party or witness to return to his own state. There is, of course, some conflict of authority as to whether parties to a suit, directly interested in the outcome of such suit, and especially parties plaintiff are entitled to the exemption, but even here the great weight of authority favors the general rule as stated by the court in the principal case. On general questions of exemption of suitors see 42 Cent. L. J. 398.

Failure to Claim Privilege Promptly.—Can this privilege be waived? Of course it can, like any other privilege. For instance, delay in claiming privilege amounts to an implied waiver. Thus, an objection to service of process on the ground that the service was made while defendant was protected by privilege because being in attendance within the district as a party to a pending action may be waived by not being promptly availed of. Matthews v. Puffer (U. S. C. C.), 19 Fed. Rep. 106, 20 Blatchf. 233. In the case cited a previous motion to set aside the service of a subpœna, on the ground of privileged attendance within the district had been denied on the ground that the defendant had failed to show that he was a non-resident of the state and the court held that, on a renewal of such motion without leave, the fact of non-residence should have been proven on the former motion. The court said: "The objection to the service, as made while the defendant was protected by a privilege, was one which the defendant could waive, and one which he might waive by not making it when he ought to make it, or by not making it in a proper way, as well as by not making it at all. It is one of those irregularities which must be promptly availed of." See also Hendrick v. Gates (Pa.), 3 C. P. Rep. 160; Watson Town Nat. Bank v. Messinger, 6 Pa. Co. Ct. Rep. 609. In the last case cited a party entitled to privilege from service of summons did not appear to the suit, and after the lapse of nearly four months and a half, and after plaintiff had entered judgment by default he presented his petition to set aside the service of summons on the ground of his privilege. The court held that the application was too late. In the case of Sebring v. Streyker, 10 Misc. Rep. 289, 30 N. Y. Supp. 1053, it was held that the exemption of a witness from service of summons being a mere personal privilege, is waived unless asserted at the first opportunity.

Appearance or Acknowledgment of Service.—The privilege of a non-resident party or witness from service of process is waived, where after service he acknowledges such service by attorney or appears and answers to the merits of the case. Under such circumstances he cannot afterwards claim the privilege. Anonymous, 9 N. J. Law J. 166; Gracie v. Palmer, 8 Wheat. (U. S.) 699; Stewart v. Howard, 15 Barb. 26. In the anonymous case reported in the New Jersey Law Journal it appeared that defendant was served with summons while he was attending as a witness in the district court. His attorney afterwards acknowledged service of the declaration in the case. A motion

was then made to set aside the service of summons which the circuit court of Essex county denied, Depue J., saying: "Where the process has been regularly served and the party has a mere personal privilege, he must exercise it promptly. Any act of party or his counsel which recognizes the propriety of the suit, such as a step in the cause, an appearance or the like, is a waiver of the defect. This rule excepts, of course, the employment of an attorney to set aside the service of summons." In Gracie v. Palmer, *supra*, Chief Justice Marshall held that it is not necessary to aver on the record that the defendant in a circuit court of the United States was an inhabitant of the district, or was found therein at the time of serving the writ. When the defendant appears without taking exception, it is an admission of the regularity of the service. The learned judge said: "The exemption from service of process in a district in which the defendant was not an inhabitant, or in which he was not found at the time of serving the process was the privilege of the defendant which he might waive by a voluntary appearance." In the case of Stewart v. Howard, *supra*, the court held that a witness exempt from service of process in a foreign state waives his privilege by giving notice, by his attorney, of retainer in the cause, and demanding a copy of the complaint. The court said: "The defendant waived his privilege by giving notice by his attorney of retainer in the cause, and demanding a copy of the complaint. If he wished to preserve his right to move to discharge the arrest, the attorney should have appeared specially." The reason for this rule is well stated by the court in the case of Webb v. Mott, 6 How. Pr. (N. Y.) 439, holding that after a general appearance by the defendant he cannot be heard objecting on account of any *irregularity* of the process by which the action was commenced. Just what might be considered *irregularities* in the service of process we need not here stop to consider. We are confident however that service of process on a non-resident party or witness, being ineffective by reason of a mere personal privilege, is such an irregularity which a general appearance will correct. To show how far reaching a general appearance goes in correcting irregularities in process, we refer to the case of Dix v. Schoolcraft, 5 How. Pr. (N. Y.) 233. In this case there was a motion to set aside the judgment entered by the plaintiff for a defect in the summons in omitting to state the court from which it emanated, Justice Gridley in denying the motion, said: "The defect in the summons would be a fatal objection to the judgment, had not the defendant's attorney given a general notice of appearance and thus waived the irregularity. The defendant having appeared in the action generally admits himself to be *regularly* in court, and therefore all defects in the summons and its service, and even the total omission of any summons at all, becomes immaterial. The defendant has taken a step in the action which admits that he is regularly brought into court." Of course, as we have observed before, an appearance for the special purpose of moving to dismiss or quash the summons is not such an appearance as amounts to a waiver of the privilege of the party or witness thus improperly served with process. Brett v. Brown, 13 Abb. Pr. (N. Y.) 295. We might also note one other exception, to-wit: an appearance in the state court for the purpose of removing the cause to the federal court. Atchison v. Morris, 11 Fed. Rep. 582. The court in that case said: "There was in fact no appearance entered in the state court, unless the filing of a petition for removal constituted such an appearance, but I think it was not in any event, such an appearance as to deprive the defendant of the right to make objection in this court to the service of summons. In fact, it may have been, among other reasons, for the very purpose of objecting to the service of summons the defendant requested that the cause might be removed to the federal court, because in a proper case a party has the right to the opinion of the federal court, on every question that may arise in the case, not only to the pleadings and merits but to the service of process."

It is true there are some cases which hold contrary views to those here expressed but it will be found on investigation that the reason for the difference of opinion is that in the jurisdictions holding that a general appearance is not a waiver of the privilege of a party or witness thus improperly served, a defense to the merits may be united with a plea in abatement. Christian v. Williams, 35 Mo. App. 297; Larned v. Griffin, 12 Fed. Rep. 590; O'Loughlin v. Bird, 128 Mass. 600. But even in such jurisdictions general appearance and answering to the merits before plea in abatement has been decided is deemed irregular. Christian v. Williams, 111 Mo. 429, *loc. cit.* 444. In Christian v. Williams, 35 Mo. App. 297, Judge Seymour D. Thompson says: "Under our Practice Act a defense to the merits may be united with a plea to the jurisdiction, but the court ought to settle the question of jurisdiction first before proceeding to try on the merits." The case of Larned v. Griffin, *supra*, goes further and intimates that the exemption of a non-resident party or witness from service of process is jurisdictional and can be raised any time, citing the case of Person v. Grier, 66 N. Y. 124. We believe, however, the courts which hold this view, miss altogether the right conception of the exemption. An examination of the early common law cases will show that originally a plea in abatement was not effective at all to reach this irregularity as the irregularity did not affect the service except at the will of the party thus improperly served expressed promptly by motion either to the court upon which he was attending as a suitor or witness or to the court issuing the process. While the later cases are quite inharmonious we are inclined to favor the view expressed by those cases which hold that this exemption being a mere personal privilege and its violation an irregularity which does not, *ipso facto* affect the jurisdiction of the court issuing the process, should be raised promptly by motion to quash and set aside the service and that a general appearance or answering to the merits amounts to a waiver of the privilege.

Executing Bail Bond to Free from Custody.—Executing a bail bond by a non-resident party or witness improperly arrested while in attendance upon court does not under later decisions amount to a waiver. Washburn v. Phelps, 24 Vt. 506; Larned v. Griffin, 12 Fed. Rep. 590; United States v. Edme, 9 S. & R. (Pa.) 147. There is a good reason for this rule and it is well stated by the court in Washburn v. Phelps, *supra*, as follows: "It is not esteemed any good ground for presuming a waiver of privilege from arrest, because the person takes the ordinary and most expeditious mode of freeing himself from arrest."

Laying Aside Character of Party or Witness.—When parties or witnesses lay aside the character of parties or witnesses, and for their own behalf and benefit give cause for the institution of actions against them by third parties, they cannot invoke this privilege, but must be deemed to have waived the exemption. Nichols v. Horton, 14 Fed. Rep. 327, 4 McCrary, 560; Woodruff v. Austin, 37 N. Y. Supp. 22. Of

course, even in such a case the trial upon which the party or witness is in attendance must not be interfered with. In the case of Nichols v. Horton, *supra*, the defendant, while in attendance as a party and witness upon the trial of a case in Howard county, Iowa, by telegram directed the sheriff of Moyer county, Minnesota, to seize by writ of attachment the goods of plaintiff, whereupon plaintiff immediately brought suit for the wrongful taking thereof, and served defendant with notice of the commencement of such suit. The court held that defendant could not protect himself from responding to the action brought against him by the alleged owner of the property, under the privilege usually accorded witnesses and parties in attendance upon a trial of a cause in court, the court saying to permit this privilege of nonresident parties or witnesses to assist them in avoiding process for wrongs committed or obligations incurred while in attendance upon the court "would enable parties and witnesses to perpetrate wrongs upon third parties and then to escape responsibility by invoking the privilege attaching to their character as parties and witnesses in pending litigation." In the case of Woodruff v. Austin, *supra*, the court denied the right to insist on the exemption because the witness remained in the foreign state after a case had been passed and witness told he might return home and return in four days, when the case was again set for trial. Witness, however, decided to stay in town in the meanwhile and transact some private business, during which time he was served with process. But see Pope v. Negas, 3 N. Y. Supp. 796, where it appeared that defendant came into the state to testify in two cases that were on the day calendars in two separate courts. On the call of the calendars, both cases were set for other days, but it did not appear that the witnesses were notified of that fact. The court held that by remaining in the state during that day's session of court defendant did not forfeit his privilege from service of process. It is evident from these cases that when a nonresident or witness lays aside his character of party or witness by committing an injury or incurring an obligation while in attendance in court, he cannot claim his privilege of exemption from service of process to answer to actions based on such injuries or obligations; and further, that where the character of party or witness is laid aside by delay in returning home after temporary or final dismissal, or by coming too soon in order to attend private business, the privilege becomes likewise ineffective as a shield from service of process. See Finch v. Galligher, 25 Abb. N. Cas. 404, 12 N. Y. Supp. 487; Marks v. La Societe, 19 N. Y. Supp. 470; Iron Dyke Copper Mining Co. v. Railroad Co., 132 Fed. Rep. 208.

Subsequent and Collateral Attack.—Where a nonresident party or witness entitled to privilege from service of process has waived the exemption by suffering judgment to go against him without raising the question by motion or plea in abatement, he cannot afterwards raise this issue on appeal (Sebring v. Stryker, 30 N. Y. Supp. 1053; Thornton v. Machine Co., 83 Ga. 288); or by amended answer (Sheehan, etc., Co. v. Sims, 36 Mo. App. 224); or by motion to set the judgment aside (Thornton v. Machine Co., 83 Ga. 288); or by collateral attack, as by setting up the privilege as a defense to an action on the judgment. Fletcher v. Baxter, 2 Aik. (Vt.) 224.

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JETSAM AND FLOTSAM.

SUITS IN THE SUPREME COURT OF THE UNITED STATES TO WHICH A STATE IS A PARTY.

In conjunction with the interesting decision of the Supreme Court of the United States in State of Kansas v. State of Colorado, 27 Sup. Ct. Rep. 655, determining the respective rights or those states in the waters of the Arkansas river, it will be profitable also to consider the decision of the same court rendered at the same time in State of Georgia v. Tennessee Copper Co., 13 Sup. Ct. Rep. 618. It was held that foreign corporations will be enjoined at the suit of the state of Georgia from so discharging sulphurous fumes from their works in Tennessee as to pollute the air over large tracts of territory in Georgia and to cause and threaten wholesale damage to forests and vegetable life therein, if not to health.

In State of Missouri v. State of Illinois and the Sanitary District of Chicago, 26 Sup. Ct. Rep. 268, Mr. Justice Holmes, speaking for the court, said in part as follows:

"It may be imagined that a nuisance might be created by a state upon a navigable river like the Danube, which would amount to a *casus belli* for a state lower down unless removed. If such a nuisance were created by a state upon the Mississippi, the controversy would be resolved by the more peaceful means of a suit in this court. But it does not follow that every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction equally would warrant an interference by this court with the action of a state. It hardly can be that we should be justified in declaring statutes ordaining such action void in every instance where the circuit court might intervene in a private suit, upon no other ground than analogy to some selected system of municipal law, and the fact that we have jurisdiction over controversies between states."

Commenting upon that decision, on March 28, 1906, we said:

"It seems clear that the parties (different states of the Union) will not be treated as private litigants, subject to ordinary rules of municipal law, but that their public and sovereign character will be taken into consideration. In controversies between states the Supreme Court of the United States will doubtless exercise a large measure of the general discretion indulged by arbitrators of international disputes."

This assumption is further borne out by the reasoning in State of Georgia v. Tennessee Copper Co., which is to the effect that the broad discretionary power of arbitrators will be exercised in a suit to which a state is a party acting in a sovereign or *quasi*-sovereign capacity for the benefit of its citizens, even though the other party be not another state but a natural or artificial person. The distinction between the attitude and policy of the court in suits to which a state is a party and suits between private individuals is emphasized by a protest from Mr. Justice Harlan in his brief concurring opinion against treating a state in any other manner than a private party would be treated. Mr. Justice Holmes, writing for the court said:

"Some peculiarities necessarily mark a suit of this kind. If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not likely to be required to give up *quasi*-sovereign rights for pay, and, apart from the difficulty of valuing such rights in money, if that be its choice, it may insist that an infraction of them

shall be stopped. The states by entering the union did not sink to the position of private owners, subject to one system of private law. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains that it would have in deciding between two subjects of a single political power. Without excluding the considerations that equity always takes into account, we cannot give the weight that was given them in argument to a comparison between the damage threatened to the plaintiff and the calamity of a possible stop to the defendants' business, the question of health, the character of the forests as a first or second growth, the commercial possibility or impossibility of reducing the fumes to sulphuric acid, the special adaptation of the business to the place.

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the acts of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be notwithstanding the hesitation that we might feel if the suit were between private parties and the doubt whether, for the injuries which they might be suffering to their property, they should not be left to an action at law."—*New York Law Journal.*

PREVENTION OR HINDRANCE BY PROMISEE AS AN EXCUSE FOR NON-PERFORMANCE.

The performance of a contract may be prevented or hindered by the promisee's failure to supply co-operation agreed upon, or by his active interference, intentional or unintentional. Where the promisor's ability to perform depends on some positive act of the promisee, necessary as prerequisite, the latter's breach of the agreement to co-operate actively so absolutely prevents performance that the defense might well be called impossibility, if the confusing applications of this term had not made use of it objectionable. Cf. 19 Harv. L. Rev. 462. Clearly the promisor's non-performance should here be excused, whether the promisee's agreement actively to co operate be express (McKee v. Miller, 4 Blackf. (Ind.) 222) or implied. Murphy v. Black, 78 Mo. App. 316; Atchison v. Williams, 28 Tex. 599; Mackey v. Dick, 6 App. Cas. 251, 263. On the other hand, even when the promisee is under no such obligation, his passive co-operation may be an important element, and if he prevents, hinders or harasses the attempted performance of the promisor, in many situations he may not be entitled to succeed in an acton for non-performance. A general theory of defense applicable to this alternative case, however, can be satisfactorily established neither by implying a promise on the part of the promisee to refrain from interfering with the promisor's performance, nor by merely allowing so-called impossibility to excuse.

Should the promisor expressly or impliedly, as in dealings on the stock exchange, assume the risk of absolute prevention (See Chicago, etc., Ry. v. Hoyt, 149 U. S. 1, 14, 15; Dolan v. Rodgers, 149 N. Y. 489, 491), or hindrance (Cf. Murdock v. Caldwell, 10 Allen (Mass.), 299), of performance by promisee, he should, of course, have no defense in the event of such interference. But usually the promisor assumes no such risk. When the promisee purposely blocks him so as to make performance impossible, whether this is effected by forcible (Jarrell v. Farris, 6 Mo. 159. Under the early common law the promisor was excused only in case of forcible prevention. 1 Rolle Abr. 453n; Co. Litt. 206*b*; Fraunce's Case, 8 Coke, 89, 92), prevention or by adversely (Connelly v. Devoe, 37 Conn. 570; King v. King, 69 Ind. 467), controlling or affecting a *sine qua non* of the contract, the promisor should be excused. This is equally so when the complete obstruction is unintentional (United States v. Peck, 102 U. S. 64. For the promisor's right of recovery for loss, see Peck's Cas., 14 Ct. Cl. U. S. 84), or indirect. Murray v. Kansas City, 47 Mo. App. 105. When the promisee does not prevent, but purposely hinders (Taylor v. Risley, 28 Hun (N. Y.), 141), performance, so that it is possible only by greater effort or expense, the promisor should again be excused. But when the hindrance is unintentional, it may well be doubted whether, as an inflexible rule, it should excuse the promisor. The necessary exceptions (Cf. Paterson v. Gage, 23 Vt. 558), can be determined by applying the principle underlying the preceding defenses. It is not a theory of legal interpretation of the contract, nor the limited equitable defense of impossibility, but an extension of equitable defenses at law to include the idea that parties to a contract should be required to deal fairly with each other. Taylor v. Risley, *supra.* When, therefore, the defense of prevention or hindrance is raised by the promisor, the question is not only what were the terms of the contract, but, whether, in the particular circumstances, the situation is such that a reasonable man would consider it unfair to the promisor to hold him accountable for non-performance. See Anvil Mining Co. v. Humble, 153 U. S. 540, 552.

A defense of this nature might have been allowed in a recent case where, owing to the negligence of the promisee's representatives, the lease of a quarry, from which the promisor contemplated supplying stone called for under the contract, expired before the promisor could have performed. The court allowed recovery on the ground that performance was not thereby made impossible. Cf. Fidelity, etc., Co. v. U. S. 137 Fed. Rep. 866; United States v. Conkling & The Fidelity, etc., Co., 37 N. Y. L. J. 129 (C. C. A., Second Circuit, March, 1907). But a failure to allow a defense on a ground short of impossibility not only may work injustice, as in the present case, but would seem to involve the harsh implication that a promisee may succeed even when he hinders and obstructs the promisor purposely, so long as he does not prevent performance absolutely.—*Harvard Law Review.*

BOOK REVIEWS.

JONES ON CORPORATE BONDS AND MORTGAGES.

No more important subject of law at the present time, at least from a financial and investment standpoint, can be found than that discussed by Judge Leonard A. Jones in the third edition of his work on Corporate Bonds and Mortgages. This work was first published in 1879, under the title of "Railroad Securities." In 1890 the second edition came from the press, the title being changed to its present form in order to indicate more accurately the true scope of the work. The new third edition contains about 250 pages of new material, this being the outgrowth of legislative developments during the past sixteen years.

Indeed the increased amount of legislation on this subject and the rapid frequency with which the courts have been compelled to wrestle with vexed problems involving the construction and execution of such bonds would seem to have demanded a new edition sooner than it appeared. When we remember that about one-third of American wealth is represented by the bonds and mortgages of railroads and other corporations and that the present day agitation and recent state and federal legislation has materially affected these securities, it would seem that the new edition of this really great and standard work on this subject should meet with a ready sale from many quarters.

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CHALONER'S LUNACY LAW OF THE WORLD.

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HUMOR OF THE LAW.

"Your honor," said the lawyer, of the man arrested for carrying a stiletto, "my client merely misconstrued the dictum that every man must carve his own way."

"The spade or shovel is a better implement for the purpose," replied the court. "Six months!"

A suit was being tried in court before a jury. A commission man had sued for advances in casings for sausage consigned to him which had not realized the amount of the advances. Defendant claimed the casings were light salted for immediate use when consigned in February and he had directed an immediate sale. The market being down for casings the commission man had held them several weeks, and found in April they were useless. The defendant had taken depositions at the commission man's city to prove value of light salted casings in February when the casings were ordered sold. Objections being made by plaintiff that the depositions were immaterial for the reason they did not tend to show any measure of damages. That if the plaintiff had converted the casings to his own use by failing to sell as ordered the measure of damages was their value when and where delivered to plaintiff which was when the casings had been shipped and given to the carrier for delivery to plaintiff. The objection being sustained the defendant called to the witness stand a butcher of the town, who was sworn and asked, "What is your business?" "I am a butcher." "How long have you been a butcher here in town?" "Fifteen years." "What was the value of light salted casings about February 10 in this town?" "I don't know dat." "Why not?" "I never bought any casings and never sold any. When I make sausage I always use my own guts."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. APPEAL AND ERROR—Amendment to Pleadings.—The question of the allowance of amendments to pleadings is within the discretion of the trial court, and, unless there has been a manifest abuse of the discretion, the supreme courtwill not interfere.—Edwards v. Chicago, M. & St. P. Ry. Co., S. Dak., 110 N. W. Rep. 882.

2. APPEAL AND ERROR — Bill of Exceptions.—Where a transcript contains a bill of exceptions which brings up the action of the court in taxing costs, and an appeal from an order taxing costs is dismissed, the bill of exceptions will be stricken from the transcript on motion. —Campbell v. First Nat. Bank, Idaho, 88 Pac. Rep. 689.

3. APPEAL AND ERROR—Bill of Exceptions.—Where, in a bill of exceptions, M individually was named as the defendant in error, and the case arose on the interposition of a claim on the levy of a mortgage in favor of M as administrator, the variance was fatal.—Rozier v. Mandle, Ga., 56 S. E. Rep. 428.

4. APPEAL AND ERROR—Conclusiveness and Findings of Appellate Court.—Whether the damages in an action for death are excessive is not subject to review by the supreme court where the appellate court affirms the judgment for the damages awarded.—Grace & Hyde Co. v. Strong, Ill., 79 N. E. Rep. 967.

5. APPEAL AND ERROR—Immaterial Mistake in Opinion —A misstatement in an opinion that plaintiff received a letter from a director, instead of a stockholder, is not ground for a rehearing, where no distinction was made between a director and a stockholder as to the right to bind the corporation.—Guillaume v. K. S. D. Fruit Land Co., Oreg., 88 Pac. Rep. 586.

6. APPEAL AND ERROR—Matter not Covered by Record. —Plaintiff's motion for judgment on defendant's failure to enter appearance within the time required by law could not be reviewed where the record failed to disclose when the appearance was entered.—Bufford v. Chambers, Ala., 42 So. Rep. 597.

7. APPEAL AND ERROR—Objections not Made Below.— Where defendant took no exception, and apparently made no objection at the trial to the manner in which certain issues were submitted to the jury, he could not object thereto on exceptions to the supreme judicial court.—Richardson v. Devine, Mass., 79 N. E. Rep. 771.

8. APPEAL AND ERROR—Questions Presented.—The court having disallowed part of an amendment, held, that an exception to the ruling could not be considered where the amendment was neither embodied in the bill of exceptions nor attached thereto as an exhibit.—Chatman v. Hodnett, Ga., 56 S. E. Rep. 439.

9. APPEAL AND ERROR—Scope and Extent of Review.— Where the court erroneously overrules a good ground of demurrer, all subsequent proceedings are to be considered as nugatory, and it is unnecessary to deal with other questions raised by assignment of error upon a judgment overruling the motion for a new trial.—Macon & B. Ry. Co. v. Walton, Ga., 56 S. E. Rep. 419.

10. APPEAL AND ERROR—Transcript.—When appeal is from a judgment sustaining an exception of no cause of action, all that the transcript need contain is the petitinn, the exception, the judgment, and the minutes of the court.—State v. Reid, La., 42 So. Rep. 662.

11. ASSOCIATIONS—Constitution, Rules and By-Laws of Unincorporated Society.—The constitution, rules, and by laws of a voluntary unincorporated association constitute a contract governing the rights and duties of the members as between themselves, and in their relation to the association, with reference to all matters of internal government and management.—Dingwall v. Amalgamated Ass'n of Street Railway Employees of America, Cal., 88 Pac. Rep. 597.

12. ATTORNEY AND CLIENT—Good Faith.—An attorney, having been employed on one side of a case and having received his client's confidence is incompetent thereafter to accept a retainer on the other side of the case. —Whitcomb v. Collier, Iowa, 110 N. W. Rep. 886.

13. BANKRUPTCY—Appeal.—Writ of error and not appeal is the only method of reviewing an adjudication of bankruptcy on directed verdict on jury trial under Act, July 1, 1898, ch. 541, § 19.—Frederick L. Grant Shoe Co. v. W. M. Laird Co., U. S. S. C., 27 Sup. Ct. Rep. 161.

14. BANKRUPTCY — Compensation of Trustee.—Under Bankr. Acts 1898, ch. 541, § 49, 30 Stat. 557 [U. S Comp. St. 1991, p. 3439], and amendment of 1903 (chapter 487, § 72, 32 Stat. 800 [U. S. Comp. St. Supp. 1905, p. 689), a contract between a trustee in bankruptcy and an unsecured creditor for additional compensation to the trustee held void. —Devries v. Orem, Md., 65 Atl. Rep. 480.

15. BANKRUPTCY — Discharge.—Under United States Bankr. Act the debtor in a judgment for obtaining property by false representations is not released from it by a discharge in bankruptcy.—Lee v. Tarplin, Mass., 79 N. E. Rep. 786.

16. BANKRUPTCY—New Promise to Pay Discharged Debt.—Whether writings executed by one discharged in bankruptcy were sufficient evidence of a promise to pay a discharged debt, under Rev. Laws, ch. 74, § 3, determined.—Nathan v. Leland, Mass., 79 N. E. Rep. 793.

17. BANKRUPTCY—Stay of Proceedings in State Court. —The entry of judgment on default before a motion by defendant for a continuance under Bankr. Act, ch. 541, § 11, had been passed on held error.—American Woodworking Machinery Co. v. Furbush, Mass., 79 N. E. Rep. 770.

18. BANKRUPTCY — Title of Assignee.—A bankrupt's assignee held to have taken title to real estate belonging to the bankrupt, though not disclosed in the bankrupt's schedules which the assignee retained until alienated by him or until deprived thereof by adverse possession.— Ledoux v. Samuels, 102 N. Y. Supp. 43.

19. BENEFIT SOCIETIES—Waiver.—A mutual benefit society held to have waived the right to have the evidence of its action in extending the time of payment of assessments in writing, and to have waived the right to insist on a forfeiture for nonpayment of assessments when due.—Farmers' & Mechanics' Life Ass'n v. Caine, Ill., 79 N. E. Rep. 956.

20. BILLS AND NOTES—Burden of Showing Illegal Consideration.—Defendant, sued on a note absolute in character, carries the burden of showing that it was given for an illegal consideration.—Yowell & Williams v. Walker, La., 42 So. Rep. 635.

21. BILLS AND NOTES—Holders for Value.—A person taking commercial paper in extinguishment of a debt, surrendering the note of his debtor and the collateral, whether before or after the maturity of the debt, is a holder for value.—Ward v. City Trust Co. of New York, 102 N. Y. Supp. 50.

22. BROKERS—Commissions.—Where nogotiations for sale of land were carried on by the owner, the agent must show that he was the efficient cause of the negotiation before he will be entitled to his commission.—Cooper v. Upton, W. Va., 56 S. E. Rep. 180.

23. CARRIERS—Contributory Negligence.—Negligence of of a passenger, in changing his position by going from a passenger compartment into the baggage compartment car, held to have contributed to his injury precluding recovery.—Bromley v. New York, N. H. & H. R. Co., Mass., 79 N. E. Rep. 775.

24. CARRIERS—Defective Stations.—A carrier, holding out a station as a proper place for its passengers to go to for the purpose of taking its cars, held liable for defects in rules regulating the use of the station, though not in control thereof, but using it under an arrangement with a lessee thereof.—Kuhlen v. Boston & N. St. Ry. Co., Mass., 79 N. E. Rep. 815.

25. CARRIERS—Liability as Insurers.—A carrier's liability as insurer continues after the arrival of the goods at their destination and until the consignee has had a reasonable time after notice to remove them.—United Fruit Co. v. New York & Baltimore Transp. Co., Md., 65 Atl. Rep. 415.

26. CARRIERS—Negligence.—If the intoxication of a passenger is well known to the carrier's servants, and their act was the direct and proximate cause of his in-

jury, the carrier is liable.—Black v. New York, N. H. & H. R. Co., Mass., 79 N. E. Rep. 797.

27. CARRIERS—Obligation to Furnish Cars.—A carrier is not required to hold for a whole week a large number of cars for a single shipper without knowing on what day of the week or on what hour of the day a single car may be needed.—Di Giorgio Importing & Steamship Co. v. Pennsylvania R. Co., Md., 65 Atl. Rep. 425.

28. CARRIERS—State Regulation of Rates.—The state of Mississippi may, as far as the federal constitution is concerned, establish a flat rate on grain and grain products within the state.—Alabama & V. Ry. Co. v. Railroad Commission of State of Mississippi, U. S. S. C., 27 Sup. Ct. Rep. 163.

29. CARRIERS—Title to Property Delivered for Transportation.—If a person not the owner of property or entitled to its possession delivers it to a railroad for shipment, the true owner, who is no party to the contract, may, before delivery by the carrier, demand and reclaim his property in trover.—Georgia R. & Banking Co. v. Haas, Ga., 56 S. E. Rep. 313.

30. CERTIORARI—Quashing of Writ.—Where a writ of *certiorari* is issued in the first instance, and it afterwards appears to the court that it was improvidently issued, it should be quashed and the petition dismissed.—City of Chicago v. Condell, Ill., 79 N. E. Rep. 954.

31. CHARITIES—Widows and Orphans Fund.—A trust for the benefit of the widows and orphans of the ministers of a certain church, etc., held a valid religious charitable trust.—Sears v. Parker, Mass., 79 N. E. Rep. 772.

32. CHATTEL MORTGAGES—Assignment.—Where by the transfer of a chattel mortgage the legal title was conveyed, the admission of a second transfer distinctly specifying that the property was intended to be conveyed was immaterial.—Joiner v. Stallings, Ga., 56 S. E. Rep. 304.

33. COMMERCE—Drummers and Peddlers.—Interstate commerce is unlawfully burdened by a municipal ordinance exacting a license from a person employed by a foreign corporation to solicit orders for groceries to be filled by shipping goods for delivery to and collection of the price from the customer.—Rearick v. Commonwealth of Pennsylvania, U. S. S. C., 27 Sup. Ct. Rep. 159.

34. CONSTITUTIONAL LAW—Criminal Prosecution.—Laws 1905, p. 186, ch. 117, § 7, providing for punishment of the parent of a "delinquent child" as for a misdemeanor, held not unconstitutional, as denying such parent the right of a trial as for any other crime.—Mill v. Brown, Utah, 88 Pac. Rep. 609.

35. CONSTITUTIONAL LAW—Municipal Regulation as to Height of Building.—St. 1904, p. 288, ch. 333, providing for dividing parts of the city of Boston into two classes, in each of which there is a prescribed limit for the height of buildings, was within the police power of the legislature.—Welch v. Swasey, Mass., 79 N. E. Rep. 745.

36. CONSTITUTIONAL LAW—Ordinances Regulating Intoxicating Liquors.—The legislature may constitutionally authorize the enactment of ordinances by cities regulating the sale of intoxicating liquors within their limits.—City of Baton Rouge v. Butler, La., 42 So. Rep. 650.

37. CONSTITUTIONAL LAW—State Inheritance Tax.—Successions which have been fully administered may be exempt from inheritance tax imposed by Act La. June 28, 1904, without rendering such statute void as a denial of the equal protection of the laws where the highest state court decides that the state can tax the property until it has passed out of the succession of the testator.—Cahen v. Brewster, U. S. S. C., 27 Sup. Ct. Rep. 174.

38. CONTEMPT—Jurisdiction.—Lack of jurisdiction in the circuit court of petition for *habeas corpus* or in the supreme court of appeal from the order denying the writ does not enable persons to disregard, without liability for contempt, order of supreme court that all proceedings against appellant be stayed.—United States v. Shipp, U. S. S. C., 27 Sup. Ct. Rep. 165.

39. CONTINUANCE—Illness of Counsel.—Refusal to continue on ground of illness of counsel, where the latter ground was not submitted for consideration below until after motion for continuance for absence of witness had been denied, held not error, under Civ. Code 1895, § 5675.—Aiken v. Carmichael Co., Ga., 56 S. E. Rep. 440.

40. CONTRACTS—Rate of Compensation.—In a suit to recover a balance under a contract for piling lumber, evidence as to the reasonable value of the services held inadmissible to corroborate the evidence of either party as to the contract rate.—Andeson v. Arpin Hardwood Lumber Co., Wis., 110 N. W. Rep. 788.

41. CONTRACTS—Unreasonable Restraint of Trade.—It is no defense to the illegality of a contract or combination in unreasonable restraint of trade that the prices of the commodity constituting its subject-matter have not been changed or have been lowered.—Pocahontas Coke Co. v. Powhatan Coal & Coke Co., W. Va., 56 S. E. Rep. 264.

42. CORPORATIONS—Contracts with Officers.—An officer of a corporation, while acting as a director, cannot fix his own salary so as to bind the corporation in an action by it or by a nonconsenting stockholder in its name, challenging the validity of the salary.—Figge v. Bergenthal, Wis., 110 N. W. Rep. 798.

43. CORPORATIONS—Examination of Books.—A director of a corporation held entitled to an order allowing him to examine its books, records, and accounts, on a showing that he has demanded and been refused permission to do so.—People v. Central Fish Co., 101 N. Y. Supp. 1108.

44. CORPORATIONS—Liabilities.—A corporation charged with a duty to the public cannot dispose of its property or franchise so as to relieve itself from liability for acts done or omitted, without legislative sanction.—Georgia R. & Banking Co. v. Haas, Ga., 56 S. E. Rep. 313.

45. CORPORATIONS—Reorganization.—A reorganization committee may be required by a stockholder of the company to render an account under a complaint alleging that the committee wasted and squandered a large amount of money in their hands, and have used for unauthorized purposes a large portion of the balance.—Mawhinney v. Converse, 102 N. Y. Supp. 279.

46. CORPORATIONS—Stockholders as Creditors.—That the by-laws of a corporation provided that no person should hold more than $400 of the stock of the corporation, which was subsequently violated, did not enlarge the stockholder's rights with reference to the withdrawal of his shares, or make him a creditor for the amount invested above $400.—Richardson v. Devine, Mass., 79 N. E. Rep. 771.

47. CORPORATIONS—Taxation.—Moneys, credits, and evidences of indebtedness of foreign banking corporation held taxable as capital employed within the state.—People v. Raymond, 102 N. Y. Supp. 85.

48. CORPORATIONS—Transfer of Assets.—The title of a transferee of corporate assets can only be impeached on the ground of fraud as against the creditors of the corporation by proof of knowledge on the part of the transferee of the intended fraud, or of such facts as will authorize the court to hold that the transferee acted in bad faith.—Ward v. City Trust Co. of New York, 102 N. Y. Supp. 50.

49. CRIMINAL TRIAL—Instructions.—That the court declined to charge as to a pertinent legal proposition is not ground for new trial where, after the jury had asked for additional instructions, the court in a recharge covered this feature of the case.—Wallace v. State, Ga., 55 S. E. Rep. 1042.

50. CRIMINAL EVIDENCE—Admissibility.—Testimony that a witness received certain information which had been previously testified to by the party giving the information and on which the witness acted, held admissible as an explanation that acting on such information he discovered other facts connecting accused with the crime.—Coleman v. State, Ga., 56 S. E. Rep. 417.

51. CRIMINAL EVIDENCE—Rape.—It was not error against defendant requiring a new trial to charge that a man cannot be convicted of rape on the testimony of the woman alone unless there are some concurrent corrob-

orating circumstances.—Vanderford v. State, Ga., 55 S. E. Rep. 1025.

52. CRIMINAL EVIDENCE—Secondary.—The agent of a nonresident business firm may testify that the firm keeps a record of the names of all employees, that he has examined the record and that the name of a certain individual does not appear thereon; and such evidence is not inadmissible on the ground that the record itself is the best evidence.—Jordan v. State, Ga., 56 S. E. Rep. 422.

53. CRIMINAL LAW—Review.—Where defendant is acquitted under one count in the indictment, an instruction relating to such count will not be considered on a conviction on other charges therein.—Aldrich v. People, Ill., 79 N. E. Rep. 964.

54. CRIMINAL LAW—Verdict.—A verdict of "guilty as charged" under an indictment charging burglary and larceny held one of guilty of burglary alone.—Dees v. State, Miss., 42 So. Rep. 605.

55. CRIMINAL TRIAL—Coercing Jury to Render Verdict. —The length of the time the jury in a criminal case shall be kept together deliberating on their verdict rests in the sound discretion of the trial court.—People v. Koerner, 102 N. Y. Supp. 93.

56. DEDICATION—Streets.—Under the law in force in 1869 there was no requirement that there should be an acceptance on the part of a municipality of a plat of an addition before it should become effective as a dedication of the streets.—Meachem v. City of Seattle, Wash., 88 Pac. Rep. 628.

57. DEEDS—Fraud.—Defendant held guilty of fraud in falsely representing to his brother and sister, all cotenants of land, the value of the land, and thereby inducing them to sell to him for much less than it was worth.—Dolan v. Cummings, 102 N. Y. Supp. 91.

58. DEEDS—Undue Influence.—Where a confidential relation exists between the grantor, who is old and feeble, and the grantee, it is presumed that the deed was executed through the undue influence of the grantee.—Couch v. Couch, Ala., 42 So. Rep. 624.

59. DEPOSITIONS—Examination of Witness. — Where witness, in answer to interrogatories, stated that minutes refreshed her memory, the facts she could recall should have been stated or read from the minutes shown her, and embodied in her answers to the interrogatories. —*In re* Tiff's Will, 101 N. Y. Supp. 1072.

60. DIVORCE—Custody of Children.—On petition in a divorce suit by a mother for restoration of her minor children held, that the order denying her application should be without prejudice to her right to make further application for privileges based on her future good conduct.—Bakley v. Bakley, N. J., 65 Atl. Rep. 440.

61. DIVORCE—Desertion.—That a wife refused to emigrate from Russia to join her husband in New Jersey held insufficient to establish desertion as of the date of her refusal.—Mizorowsky v. Mizorowsky, N. J., 65 Atl. Rep. 456.

62. DIVORCE—Failure to Pay Alimony.—A failure to comply with an order requiring payment of alimony and attorney's fees is a continuing contempt, and the court may enter judgment that the party be imprisoned until he shall comply.—Gray v. Gray, Ga., 56 S. E. Rep. 438.

63. DIVORCE—Subsequent Birth of Child.—A finding against condonation by intercourse after date of libel for divorce does not tend to bastardize a child born after a decree *nisi* is entered.—Koffman v. Koffman, Mass., 79 N. E. Rep. 780.

64. ELECTIONS—Nominations.—The special term has no jurisdiction to review the action of the board of elections overruling the objections to a certificate of nomination on the petition of an elector who did not file objections to the certificate.—*In re* Logan, 102 N. Y. Supp. 200.

65. EMINENT DOMAIN — Compensation. — Landowner held entitled to compensation for the land taken for widening a public road, and also for the injury sustained, to the extent of the diminution in the market value of his property.—Terrell County v. York, Ga., 56 S. E. Rep. 309.

66. EMINENT DOMAIN — Loss of Remedy.—Where the owner of a lot has lost his right to damages in eminent domain proceedings for the taking of a part of it for street purposes, by his delay, he cannot resort to an action of contract to recover the damages.—Hodgdon v. City of Haverhill, Mass., 79 N. E. Rep. 818.

67. EMINENT DOMAIN — Telephone Lines.—Where a telephone line was occupying a highway without right as against the owner of the fee, it was immaterial to the latter's right to an injunction that the convenience of the public was subserved by defendant's occupancy of such highway.—Burrall v. American Telephone & Telegraph Co., Ill., 79 N. E. Rep. 705.

68. EVIDENCE—Secondary.—Where a ledger has been destroyed, it was proper as preliminary to proof of its contents to ask a witness who had kept it whether or not it contained an account with a certain person.—Luty v. Cresta, Cal., 88 Pac. Rep. 642.

69. EVIDENCE — Conclusions of Witness.—A witness cannot state his mere conclusion that others than himself knew a particular fact.—Bush & Hattway v. W. A. McCarty Co., Ga., 56 S. E. Rep. 430.

70. EXCEPTIONS, BILL OF—Form and Arrangement.— The court on appeal in passing on the propriety of the court granting a prayer complained of in the second bill of exception held entitled to consider evidence contained in the first bill of exception.—Di Giorgio Importing & Steamship Co. v. Pennsylvania R. Co., Md., 65 Atl. Rep. 425.

71. EXECUTION— Supplemental Proceedings.—A defendant cannot be ordered to appear in supplementary proceedings before the clerk of the court, while there is a similar proceeding instituted for the same purpose pending on appeal to the supreme court.—Ledford v. Emerson, N. Car., 55 S. E. Rep. 969.

72. EXECUTORS AND ADMINISTRATORS—Revocation of Letters.—Under the facts, the supreme court would not interfere with a decree denying the application of one holding alleged ancillary letters of administration for the revocation of letters subsequently issued to another. —*In re* Schmid, 102 N. Y. Supp. 80.

73. EXECUTORS AND ADMINISTRATORS—Rights of Heirs. —A person inheriting property upon which one afterwards appointed administrator has expended money belonging to his intestate is not estopped as an heir of such intestate from demanding that the administrator pay to the estate the sum so expended.—Coffey v. Coffey, Mass., 79 N. E. Rep. 742.

74. EXECUTORS AND ADMINISTRATORS—Several Executors.—Where a power has been given to several executors, but only one of them acts as such, the others having resigned, he can alone exercise the power.—Cushman v. Cushman, 102 N. Y. Supp. 258.

75. FALSE IMPRISONMENT — Damages.—When a railroad company is liable for the act of its train conductor in unlawfully arresting and imprisoning a person on the train, and such act is malicious, wanton, or reckless, the company is liable for exemplary damages.— Davis v. Chesapeake & O. Ry. Co., W. Va., 56 S. E. Rep. 400.

76. FIRE INSURANCE—Construction of Policy.—A policy providing that it should not cover any merchandise on which there was specific insurance at the time of the loss held not a part of the "whole insurance" on merchandise covered by specific insurance.—Klotz Tailoring Co. v. Eastern Fire Ins. Co., 102 N. Y. Supp. 82.

77. FIRE INSURANCE—Description of Building.—A fire policy describing the building insured as a dwelling house held not to cover a building, the basement and first floors of which were used as stores, and the second floor for dwelling purposes. — Bowdtich v. Norwich Union Fire Ins. Soc., Mass., 79 N. E. Rep. 788.

78. FIXTURES—Abandonment.—Title to rails held not to vest in the person from whom right of way was obtained by virtue of the doctrine of abandonment of trade fixtures, nor could the landowner successfully claim the

rails and fastenings laid solely for the purpose of operating the railroad as being fixtures.—Georgia R. & Banking Co. v. Haas, Ga., 56 S. E. Rep. 818.

79. FORGERY—Intent.—Knowingly passing as genuine a forged instrument is conclusive of the intent to defraud, and hence a charge to that effect is not erroneous on the ground that the intent is a matter for the jury.—Jordan v. State, Ga., 56 S. E. Rep. 422.

80. FRAUDS, STATUTE OF—Contract of Employment.—Where an oral contract of employment for more than a year had been voluntarily performed by both parties, neither could afterwards allege its invalidity under the statute of frauds.—Schrader v. Fraenckel, 102 N. Y. Supp. 335.

81. FRAUDS, STATUTE OF —Estoppel to Plead.—A licensee's right under a parol license to construct and use a road held enforceable in equity where a consideration is paid and the road constructed, taking the case out of the statute of frauds.—Storseth v. Folsom, Wash., 88 Pac. Rep. 632.

82. FRAUDS, STATUTE OF—Sale of Goods.—A delivery of goods to a carrier for transportation only does not give them express or implied authority to accept them, and is not sufficient acceptance to take the agreement out of the statute of frauds.—Kemensky v. Chapin, Mass., 79 N. E. Rep. 781.

83. GIFTS—Parol Gift of Land.—A parol gift of land, in order to be sustained, must be established by a clear and unequivocal showing, but not necessarily by undisputed evidence.—Bevington v. Bevington, Iowa, 110 N. W. Rep. 840.

84. GUARDIAN AND WARD—Appointment Under Misrepresentation.—Where letters of guardianship are issued upon false representations, and it appears from the true statement of the facts that the surrogate's court would not have jurisdiction of the matter under any circumstances, the letters should be revoked and the guardian directed to account.—*In re* Burns, 102 N. Y. Supp. 203.

85. GAMING—Recovery of Payments as Margins.—Customers paying sums to agent of defendant as margins on sales and purchases which were not actually made held entitled to recover them notwithstanding transfer of accounts to another company.—Fuller v. Municipal Telegraph & Stock Co., 102 N. Y. Supp. 154.

86. GAMING—Statutory Provisions.—The charter of the city of Portland held not to confer exclusive jurisdiction to the city to prevent gambling houses, and as this is an offense under B. & C. Comp. 1930, a circuit court has jurisdiction in such a case.—State v. Ayers, Oreg., 88 Pac. Rep. 653.

87. HIGHWAYS—Permissive Use as Highway.—Where the public has had exclusive possession and use of land for a public highway for a period of time barring recovery, the burden is on the owner of the title to show that the use was permissive.—Meade v. City of Topeka, Kan., 88 Pac. Rep. 574.

88. HOMICIDE—Attempt to Procure Abortion.—Where death results, either from an abortion or an attempt to produce one, the person responsible is guilty of murder, under division 1 of the criminal code, § 8, Hurd's Rev. St. 1905, p. 665.—Clark v. People, Ill., 79 N. E. Rep. 941.

89. HOMICIDE — Instruction as to Legal Malice.—A charge that legal malice is an unlawful intent to kill, without justification or mitigation, which must exist at the time of the killing, but not necessarily any length of time before the killing, was not erroneous.—Long v. State, Ga., 56 S. E. Rep. 444.

90. HOMICIDE — Involuntary Manslaughter. — Where accused was convicted of involuntary manslaughter in the commission of an unlawful act, the judgment will not be reversed for failure to charge on voluntary manslaughter.—Harbin v. State, Ga., 55 S. E. Rep. 1046.

91. HUSBAND AND WIFE—Validity of Gift.—Where a mother gave certain property to her daughter-in-law, the donation held not subject to an exeution on a judgment in favor of a creditor of the son, where the debt had its origin long after such donation.—Hurst v. W. B. Thompson & Co., La., 42 So. Rep. 645.

92. INDICTMENT AND INFORMATION — Conviction of Lesser Offense.—Where defendant was indicted for robbery, which charge was amply sustained by the evidence, and there was no proof of larceny, a verdict finding defendant guilty of larceny was unsustainable.—Kemp v. State, Miss., 42 So. Rep. 606.

93. INFANTS—Actions.—A minor has no further time than an adult within which to take steps for the correction of errors in proceedings or a judgment against him.—Welsh v. Koch, Cal., 88 Pac. Rep. 604.

94. INFANTS—Suit to Set Aside Decree.—To avail infant parties, defendants to a suit in chancery, in maintaining a bill to reverse the decree in such suit, the cause for reversing must have existed at the time of the entry of the decree.—Poling v. Poling, W. Va., 55 S. E. Rep. 993.

95. INJUNCTION—Restrictive Covenants.—A violation of a restrictive covenant, creating a negative easement may be restrained at the suit of one owning property for whose benefit the restriction was established.—Silberman v. Uhrlaub, 102 N. Y. Supp. 299.

96. INTOXICATING LIQUORS—Sale Without License.—In an action for unlawfully selling and retailing intoxicating liquor without a license, defendant held entitled to compel the state to elect the particular sale on which it relied, and confine its testimony to that.—Kittrell v. State, Miss., 42 So. Rep. 609.

97. JUDGMENT—Entry as to One Defendant.—Where two are sued as partners, plaintiff may strike one of the defendants and obtain a judgment against the remaining defendant, if the evidence shows a several liability.—Doody & Co. v. Jeffcoat, Ga., 56 S. E. Rep. 421.

98. JUDGMENT—Setting Aside for Fraud.—A suit in equity may be maintained by a defendant against whom judgment has been rendered to set aside the same for fraud of the plaintiff extrinsic the record action.—Welsh v. Koch, Cal., 88 Pac. Rep. 604.

99. JUDGMENT—Vacation After Term.—A judgment entered by the clerk without order of court or the filing of signed findings, as provided by Rev. St. 1898, § 2894, held subject to vacation as entered by inadvertance or mistake.—Sackett v. Price County, Wis., 110 N. W. Rep. 821.

100. JUSTICES OF THE PEACE—Argument of Counsel.—It was no ground for reversal that when defendant's counsel was making his concluding argument before a justice the magistrate allowed plaintiff's counsel to argue as to an authority cited.—Glenn v. Augusta Drug Co., Ga., 55 S. E. Rep. 1032.

101. JUSTICES OF THE PEACE—Time of Taking Appeal.—That the justice after the trial, but before judgment, expressed to an attorney for plaintiff his intention to render a judgment for him, but later gave judgment against him, does not constitute good cause for not having obtained the appeal within statutory period.—McClung v. Price, W. Va., 55 S. E. Rep. 906.

102. LANDLORD AND TENANT—Collection of Rent.—Where the amount due a landlord is measured by the value of the specifics in which the rent is payable, amendment of pleadings by alleging the value of the specifics claimed is of a larger sum than that originally named in the affidavit upon which the distress warrant issued, held proper.—Cornwell v. Leverette, Ga., 56 S. E. Rep. 800.

103. LANDLORD AND TENANT—Holding Over a Removal of Lease.—A holding over by the lessee after notice of intent to vacate held, at the option of the lessor, to amount to a renewal for an additional year.—Crawford v. Kline, N. J., 65 Atl. Rep. 441.

104. LIBEL AND SLANDER—Words Actionable Per Se.—Spoken words falsely imputing to another a criminal offense are actionable *per se*, without proof of express malice.—Abraham v. Baldwin, Fla., 42 So. Rep. 591.

105. LIFE ESTATE—Rights of Life Tenant.—Where a will gives property to one for life, with remainder over, the life tenant is entitled to the possession of the prop-

erty on giving a bond satisfactory to the remainderman for his proper conduct.—*In re* Fleming's Estate, 102 N. Y. Supp. 204.

106. LIMITATION OF ACTIONS—Account Stated.—Where a balance in a mutual account concurrent beween parties is stated, the six-year statute of limitations commences to run as to the transactions included in the account up to that time.—Figge v. Bergenthal, Wis., 110 N. W. Rep. 798.

107. LIVERY STABLE KEEPERS—Municipal Regulation. —An ordinance restricting the right to operate livery stables in the residence district of a city held inoperative and void as to defendants, as an unjust discrimination between them and other livery stable proprietors. —City of Billings v. Cook, Mont., 88 Pac. Rep. 656.

108. MANDAMUS—Performance of Official Duties.—*Mandamus* will not be awarded to compel an officer to act unless he has willfully disregarded his duty, or his action was flagrantly unjust.—State v. Bare, W. Va., 56 S. E. Rep. 390.

109. MANDAMUS—To Remand Case to State Court.—*Mandamus* is the proper remedy where Circuit Court of United States refuses to remand to the state court from which it is removed a case over which the federal court has no jurisdiction.—*Ex parte* Wisner, U. S. S. C., 27 Sup. Ct. Rep. 150.

110. MASTER AND SERVANT—Assumed Risk —One entering the employment of a telephone company as operator at its exchange held to assume only the ordinary risks of irritation reasonably connected with the performance of his duties.—Cahill v. New England Telephone & Telegraph Co., Mass., 79 N. E. Rep. 821.

111. MASTER AND SERVANT — Contract of Employment.—Where an oral contract of employment for more than a year was afterwards renewed for a year, it fixed the rate of compensation as well as the term of service. —Schrader v. Fraenckel, 102 N. Y. Supp. 335.

112. MASTER AND SERVANT—Injuries to Servant.—In an action for injuries to a rider on a saw carriage in a sawmill, alleged to have been due to the fact that the carriage was not subject to proper control, evidence considered, and held that the question of negligence in such respect was one for the jury.—Odegard v. North Wisconsin Lumber Co., Wis., 110 N. W. Rep 809.

113. MINES AND MINERALS—Oil and Gas Lease.—Under oil and gas lease, lessor held entitled to prevent lessee from continuing to hold right granted without exploration or development for the whole of the contract period.—Dill v. Fraze, Ind., 79 N. E. Rep. 971

114. MUNICIPAL CORPORATIONS—Fiscal Management. —In proceeding to restrain unlawful expenditure by town, courts held not entitled to consider objections to the qualifications of the officer whose acts are in question or their good faith in the performance of their official duties.—Hodgdon v. City of Haverhill, Mass., 79 N. E. Rep. 830.

115. MUNICIPAL CORPORATIONS—Removal of Police.— The common law writ of *certiorari* will lie to review a proceeding of the civil service commissioners removing a police officer appointed under civil service rules and regulations.—City of Chicago v. Condell, Ill., 79 N. E. Rep. 954.

116. MUNICIPAL CORPORATIONS—Rights of Pedestrian. —A pedestrian when running to catch a car may without negligence divide his attention between the car he is bent on catching and the intervening track, and has a right to assume that the roadway is safe for travel.— Weber v. Union Development & Construction Co., La., 42 So. Rep. 652.

117. NEGLIGENCE — Assumed Risk.—Whether a telephone operator assumed the risk by using the apparatus after knowledge that something was defective therein held for the jury.—Cahill v. New England Telephone & Telegraph Co., Mass., 79 N. E. Rep. 821.

118. NEGLIGENCE—Proximate Cause.—Where plaintiff's negligence places him in a dangerous situation, and defendant, with full knowledge of such situation and opportunity by exercise of reasonable care to avoid any injury, causes an injury, defendant is liable.—Black v. New York, N. H. & H. R. Co., Mass., 79 N. E. Rep. 797.

119. NEW TRIAL—Argument of Counsel.—A new trial will not be granted for the remarks of the prosecuting attorney, when no exception was taken and the language complained of is not such as to authorize a conclusion that defendant was injured thereby.—White v. State, Ga., 56 S. E. Rep. 425.

120. NEW TRIAL—Verdict Contrary to Evidence.—To justify setting aside a verdict on the ground that it is plainly against the weight and preponderance of conflicting evidence, a verdict must be palpably unjust. A doubtful case or a slight weight in the preponderance of the evidence is not sufficient to warrant setting it aside. —Coalmer v. Barrett, W. Va., 56 S. E. Rep. 385.

121. NUISANCE—Construction of Statute.—To constitute an offense under B. & C. Comp. § 1930, it is not necessary that there be an actual breach or disturbance of the peace, but it is sufficient if any act be committed which would constitute a nuisance at common law.— State v. Ayers, Oreg., 88 Pac. Rep. 653.

122. OBSTRUCTING JUSTICE—Bribery of Witness.—On the trial of one charged with attempting to corrupt a witness, it is reversible error to allow the state to introduce evidence that defendant offered a person a certain sum to steal a written instrument called a certain power of attorney, where the information contained no charge of that nature.—Gandy v. State, Neb., 110 N. W. Rep 862.

123. OFFICERS—Ineligibility.—The ineligibility of a person to office because of official defalcation in the past does not cease on the defalcation being made good by his sureties, and a receipt to them is not a discharge obtained by the officer within Const. art. 182.—Stewart v. Reid, La., 42 So. Rep. 662.

124. PARTIES—Change of Defendants.—A motion to substitute a party for the party named in the summons and complaint should be denied where no service has been had on the substituted party, and it has not appeared in the proceedings.—Levick v. Niagara Falls Home Telephone Co., 102 N. Y. Supp. 150.

125. PLEADING—Sufficiency of Complaint.— In an action against a carrier for delay in transportation of a car of melons, a paragraph alleging that plaintiff was damaged for overcharge of freight on said car of melons in a certain sum set forth a legal cause of action.—Macon & B. Ry. Co. v. Walton, Ga , 56 S. E. Rep. 419.

126 PRINCIPAL AND SURETY—Execution of Bond.—In an action on an official bond, it was competent for the sureties to testify that in signing the same it was not their intention to deliver the bond without the principal's signature.—School Dist. No. 80 in Morrison County v. Lapping, Minn., 110 N. W. Rep. 849.

127 PROHIBITION—Judicial Acts.— A preliminary injunction which deprives a party to the suit in which it was awarded of his possession of property without a hearing held null and void, being an act in excess of the jurisdiction of the court.—Powhattan Coal & Coke Co. v. Ritz, W. Va , 56 S. E. Rep. 257.

128. RAILROADS—Conversion.—If a lessee of the property and franchises of a railroad company as a common carrier commits a conversion of property, the lessor may be held liable therefor, in the absence of legislative provision.—Georgia R. & Banking Co. v. Haas, Ga., 56 S. E. Rep. 313.

129. RAILROADS—Country Crossings. —Since a higher right of speed in the movement of electric cars is permissible in the open country than along the streets of a city, more caution is demanded of one crossing the tracks in the country than in cities.—Phillips v. Washington & R. Ry. Co., Md., 65 Atl. Rep 422.

130. RAILROADS—Failure to Give Signal at Crossing.— The failure to give the usual signals at a public station held not negligence as to those having the right to use

a private crossing beyond.—Annapolis, W. & B. R. Co. v. State, Md., 65 Atl. Rep. 434.

131. RAILROADS—Injuries to Animals.—The regulations approved by railroad commissioners limiting the speed of trains are designed for the safety of trains, and do not affect a railroad company's duty to one permitting a horse to stand near its track.—Gerry v. New York, N. H. & H. R. R., Mass., 79 N. E. Rep. 783.

132. RAILROADS—Injury to Employee Riding on Pass.—Though a condition of a pass issued to a railroad employee as a gratuity, that he assumes all risk of accident, is binding, it is not binding where the pass is issued as one of the terms of his employment.—Dugan v. Blue Hill St. Ry. Co., Mass., 79 N. E. Rep. 748.

133. RAILROADS—Jolt Causing Injury to Passenger.—The jolting or lurching of a railroad car as the train was passing over a cross-over switch, resulting in a passenger being thrown from the car and injured, held not to constitute negligence on the part of the carrier.—Foley v. Boston & M. R. R., Mass., 79 N. E. Rep. 765.

134. RAILROADS—Tickets.—Ordinarily a railroad ticket is not a contract in writing in the sense that it governs the duties and liabilities of the parties.—McCollum v. Southern Pac. Co., Utah, 88 Pac. Rep. 663.

135. RELEASE—Construction and Operation.—A release given by a beneficiary in a mutual benefit certificate in consideration of receiving a part of the amount of the certificate held a mere receipt and a discharge only of so much of the amount due as is equal to the sum received.—Farmers' & Mechanics' Life Ass'n v. Caine, Ill., 79 N. E. Rep. 956.

136. REMOVAL OF CAUSES—Nonresidence of Both Parties.—A suit, which by reason of nonresidence of parties could not have been brought in the federal circuit court in the first instance, held not removable to that court from the state court on the ground of diverse citizenship, under Act March 3, 1887, ch. 373, 24 Stat. 552, and Act Aug. 13, 1888, ch. 866, 25 Stat. 433, U. S. Comp. St. 1901, p. 508.—*Ex parte* Wisner, U. S. S. C., 27 Sup. Ct. Rep. 150.

137. SALES—Acceptance.—Where a contract for the sale of a machine provided that, if it could not be made to work well, the purchaser should return it, merely storing the machine and notifying the seller that it was subject to his order was not a return under the contract.—International Harvester Co. of America v. Dillon, Ga., 55 S. E. Rep. 1034.

138. SALES—Acceptance of Goods.—Acceptance of the portion of a shipment of hats complying with the contract of sale held not an acceptance of the entire shipment.—Schiller v. Blyth & Fargo Co., Wyo., 88 Pac. Rep. 648.

139. SALES—Conditional Sale.—An unconditional assignment of a note given for the price of personalty, wherein the seller retains title, does not extinguish the security, and the title retained by the seller vests in the assignee.—Townsend v. Southern Product Co., Ga., 56 S. E. Rep. 436.

140. SALES—Failure to Deliver Within Contract Time.—Measure of damages for failure to deliver coal within contract time held the difference between purchase price paid and the wholesale market price on the day it should have arrived.—Stecker v. Weaver Coal & Coke Co., 102 N. Y. Supp. 89.

141. SALES—Goods to be Manufactured.—The vendor's right to recover damages for breach of contract to receive goods to be manufactured held not changed by the fact that he himself is not the manufacturer, and that he intended to procure others to manufacture the goods.—H. D. Taylor Co. v. Niagara Bedstead Co., 102 N.Y. Supp. 173.

142. SALES—Misrepresentation.—In an action to recover on notes given on the purchase price of a restaurant business and personal property used in connection therewith, held no defense that the sellers had misrepresented the quality of the property and the value of the business.—Jones v. Reynolds, Wash., 88 Pac. Rep. 577.

143. SPECIFIC PERFORMANCE—Venue.—Where a vendee of a bond for title dies, a suit for specific performance by his heirs may be laid in the county of the residence of the vendor or the residence of any one of the heirs who agreed to the substitution of certain other heirs on the bond for title.—Jackson v. Jackson, Ga., 56 S. E. Rep. 818.

144. STREET RAILROADS—Excessive Speed.—It is negligence for a street car company to operate its cars at such speed as not to have them under control as they approach intersecting streets.—Ashley v. Kanawha Valley Traction Co., W. Va., 55 S. E. Rep. 1016.

145. STREET RAILROADS—Terms of Franchise.—A resolution of highway commissioners extending the time for the construction of a railroad is not a waiver of the provision in the original franchise requiring the giving of a bond.—South Shore Traction Co. v. Town of Brookhaven, 102 N. Y. Supp. 75.

146. TAXATION—Collection.—An injunction will not lie to restrain the collection of taxes on the ground of illegality of the assessment, unless it is clearly made to appear that the party has been wrongfully assessed.—Pierce v. Carlock, Ill., 79 N. E. Rep. 959.

147. TAXATION—Liability of Tax Collector on Official Bond.—A county tax collector is liable on his official bond for taxes collected by him as taxes, though he had no legal authority to collect them.—Adams v. Saunders, Miss., 42 So. Rep. 602.

148. TAXATION — Persons Subject. — A tax assessed against persons as executors held not assailable, on the ground that the assessment should have been against them as trustees.—Williams v. Inhabitants of Brookline, Mass., 79 N. E. Rep. 779.

149. TAXATION—Tax Titles.—Where landowner sued to quiet title against tax deed, and the bearer thereof sued to foreclose and actions were consolidated, and deed was held void, judgment against owner was premature under Rev. St. 1898, § 1210h.—Maxcy v. Simonson, Wis., 110 N. W. Rep. 803.

150. TRIAL—Variance.—The failure of one suing for injuries from a defect in a railroad bridge to prove the date of the injury as alleged in the complaint is not a fatal variance.- Southern Ry. Co. v. Taylor, Ala., 42 So. Rep. 625.

151. TRUSTS—Accounting.—Where a trust is not created after money is received by the trustee, an action for money had and received will not lie for its recovery, and an action against the executors of the trustee for an accounting is not one in which plaintiff has a concurrent remedy in equity and in law.—Anderson v. Fry, 102 N. Y. Supp. 112.

152. VENDOR AND PURCHASER—Trustee for Prior Purchaser.—A party taking a conveyance of land with notice of a previous sale to another, or knowledge of such facts which would charge him with notice, holds it in trust for him.—Smith v. Umstead, N. J., 65 Atl. Rep. 442.

153 WILLS—Partial Invalidity.—Where a will directs that the bulk of the estate be held in trust until the death of testator's widow, and the surplus income to be accumulated, and the certain specific legacies to his daughters be paid, and the remainder to be divided among the sons, the surplus income belongs to the sons.—Endress v. Willey, 102 N. Y. Supp. 71.

154. WITNESSES—Character Evidence.—In prosecution for murder committed while attempting to procure an abortion, the trial court held not to have erred in not allowing defense to show good reputation of witness, where original testimony of such witness should not have been admitted.—Clark v. People, Ill., 79 N. E. Rep. 941.

155. WOODS AND FORESTS — Forest Preserves. — The holding by the state of a belt of timber land in connection with its canal system held not inconsistent with its being a part of the forest preserve, where the purpose of the holding was not to cut the timber and devastate the land, but to preserve and protect the water supply.—People v. Fisher, 101 N. Y. Supp. 1047.